In the Supreme Court of the United States

OCTOBER TERM, 1967

No. ——

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

FREDERICK STEEL CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case, but only if this Court grants the petition for a writ of certiorari in *Frank Ix & Sons Virginia Corporation* v. *Commissioner,* No. 334, this Term, which the Commissioner will oppose.

OPINIONS BELOW

The opinion of the Tax Court (R. 84a–96a)[1] is reported at 42 T.C. 13. The amended opinion of the

[1] "R" references are to the appendix to the taxpayer's brief in the court of appeals.

271-571—67——1

court of appeals (Appendix A, *infra*, pp. 7–14), is reported at 375 F. 2d 351.

JURISDICTION

The judgment of the court of appeals (Appendix A, *infra*, pp. 14–15) was entered on March 3, 1967. By order dated June 5, 1967, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including July 31, 1967. Jurisdiction is conferred on this Court by 28 U.S.C. 1254(1).

QUESTION PRESENTED

Under the Internal Revenue Code of 1939, as construed by this Court in *Libson Shops, Inc.* v. *Koehler*, 353 U.S. 382, a corporation could not carry over, as an offset against its income, the net operating losses of one business against the profits generated by another business in later years. Section 382(a) of the Internal Revenue Code of 1954 specifically bars net operating loss carryovers only when there has been a change in the business coupled with a change in ownership of fifty percentage points or more of the stock of the loss corporation other than through a tax-free reorganization.

The question presented is whether the taxpayer corporation may carry over its losses incurred prior to 1954 as an offsetting deduction against income earned in 1954 and subsequent years as a result of abandonment of its own business and acquisition of [redacted] another corporation engaged in a different business.

STATUTES INVOLVED

The relevant statutes are set forth in Appendix B, *infra*.

STATEMENT

Prior to July 14, 1954, respondent was known as the Cleveland Home Brewing Company. It had sustained heavy losses in the operation of its beer and ice businesses. The beer business was discontinued early in 1952, and the ice business ended in August of 1952. Throughout the remainder of 1952 and 1953 respondent's only business was an attempt to put its idle real estate to some profitable use; it was unsuccessful, and incurred net operating losses during both those years (R. 93a–94a).

On May 9, 1952, a Mr. Byer acquired nearly 95 percent of the outstanding shares of petitioner's stock (R. 89a). Byer was the sole shareholder of American Compressed Steel Corporation, which was in the scrap business, and which in turn operated a division known as Frederick Steel Company. Frederick Steel was in the finished steel jobbing business; for the fiscal year ending October 31, 1953, it had net earnings in excess of $41,000 (R. 91a).

On July 12, 1954, respondent acquired the Frederick Steel Company from American Compressed Steel. After this acquisition, respondent changed its name to Frederick Steel Company, and operated the finished steel jobbing business (R. 91a–92a). From 1954 through 1957 respondent operated that business at a profit, reporting taxable income ranging from a

low of $81,000 in 1957 to a high of $221,000 in 1954[2] (R. 93a).

Respondent attempted to offset against its 1954 through 1957 profits the losses incurred prior to 1952 and up through 1953 (R. 94a). The Tax Court held that under the doctrine of *Libson Shops, Inc.* v. *Koehler,* 353 U.S. 382, the losses could not be carried over, since those loses grew out of an entirely different enterprise than had generated the post-1954 profits (R. 95a–96a). The court of appeals reversed. It held that the provisions of the 1954 Code, and not the doctrine of *Libson Shops,* governed allowance of the carryover, but that the loss carryover limitations set forth in Section 382(a) of the 1954 Code were inapplicable because the change in ownership of the loss corporation had occurred prior to June 22, 1954.

REASONS FOR GRANTING THE WRIT

The decision of the Sixth Circuit in the present case is in direct conflict with the decision of the Second Circuit in *Allied Central Stores, Inc.* v. *Commissioner,* 339 F. 2d 503, 504–505, certiorari denied, 381 U.S. 903, and that of the Third Circuit in *Frank Ix & Sons Virginia Corporation* v. *Commissioner,* 19 A.F.T.R. 2d 1175, petition for certiorari pending, No. 334, this Term. The Commissioner nonetheless believes that the issue is inappropriate for review by this Court because of its unimportance for the future, and he therefore intends to oppose the petition in *Ix.*

[2] The 1954 amount includes a long term capital gain of $201,000.

The question is pertinent only in those circumstances where a set-off is sought of pre-1954 losses against post–1954 earnings of a corporation whose ownership changed hands prior to June 22, 1954, the effective date of Section 382 of the 1954 Code. The Commissioner is aware of only one other pending case,[3] in addition to the present one and *Ix*, in which this question is raised, and future cases are unlikely to arise. This petition is being filed to protect the revenue in the event that the Court grants review on this issue in *Ix*.[4] For if it does so and then affirms, the Commissioner should prevail in this case—which involves approximately $164,000 in taxes plus accrued interest (R. 97a).

CONCLUSION

The petition for a writ of certiorari should be granted only if certiorari is granted in *Frank Ix & Sons Virginia Corporation* v. *Commissioner*, No. 334, this Term.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JULY 1967.

---

[3] *Amherst Coat Co., et al.* v. *United States*, Civil Actions Nos. 2604–2606, S.D. W. Va. These are three consolidated cases involving approximately $742,000 in asserted tax liability.

[4] *Ix* also involves another issue as to the proper application of *Libson Shops*. Petitioner in *Ix* asserts that the decision on that issue is in conflict with *United States* v. *Jackson Oldsmobile*, 371 F. 2d 808 (C.A. 5).